Supreme Court, U.S.
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NO. 91-1129

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RONALD DEE BECK,
Petitioner,

vs.

LILLIAN M. BECK,
Respondent.

SUPPLEMENTAL APPENDIX

TO

PETITION FOR A WRIT OF CERTIORARI

TO THE

SUPREME COURT OF TEXAS.

James M. Morris
Kennedy, Minshew, Campbell
& Morris
320 North Travis, Suite 207
P.O. Box 758
Sherman, TX 75091
(903) 868-0545 - Telephone
(903) 868-0548 - Fax

APPENDIX C

Affirmed and Opinion filed June 15, 1990

In The
COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-89-00913-CV

RONALD DEE BECK, Appellant

V.

LILLIAN M. BECK, Appellee

On Appeal from the 336th District Court
Grayson County, Texas
Trial Court Cause No. 89-1002

OPINION

Before Justices Whitham,
Ovard and Whittington
Opinion By Justice Whitham

The controversy enters on the status of earnings and income from separate property deposited from time to time after

marriage in the wife's separate bank accounts. If the hereinafter quoted paragraph four in a prenuptial agreement is valid, the earnings and income are the separate property of the wife. If invalid, the earnings and income are community property. Therefore, this appeal presents the issue of whether paragraph four of a prenuptial agreement executed October 26, 1977, is void as violating article 16, section 15 of the Texas Constitution as the Constitution then provided. *See* TEX. CONST. art. XVI, § 15 (as amended 1948; amended 1980, 1987). In his fourth point of error, appellant, Ronald Dee Beck, individually and as independent executor of the estate of Audrian L. Beck, contends that the trial court erred in granting summary judgment in favor of appellee, Lillian M. Beck, because paragraph four of the

prenuptial agreement was void as violating article 16, section 15 of the Texas Constitution as it provided on October 27, 1977. We disagree. We conclude that paragraph four of the prenuptial agreement is valid. We overrule Ronald's fourth point of error. Because our ruling on Ronald's fourth point of error disposes of this appeal, we conclude that we need not address Ronald's first three points of error involving limitation questions arising under Lillian's defensive allegations. Accordingly, we affirm.

On November 1, 1977, Audrian L. Beck married Lillian Massingale. At the time of their marriage, Audrian and Lillian were elderly. They each had previously been married; Lillian's first husband died a number of years earlier, while Audrian had only recently divorced his first wife. Both Audrian and Lillian had

adult children from their prior marriages. Lillian had accumulated a considerable amount of property prior to her marriage to Audrian, most of which was derived from her first marriage. In anticipation of their marriages, Audrian and Lillian entered into a marital property agreement on October 26, 1977. This agreement was drafted by Lillian's attorney and reviewed by Audrian's attorney. Audrian and Lillian executed this agreement before Audrian's attorney, who notarized their signatures. The agreement was prepared at the instance of both Audrian and Lillian. Paragraph four of the agreement provides:

> Notwithstanding that under the laws of the State of Texas the income from respective separate properties of Audrian and Lillian will be community property, they hereby agree that all the properties of every kind and nature, real and personal, held or standing in the name of only one of them shall be considered as a separate

> property of the one of them in whose name such property is held or stands, and that only properties, whether real or personal, held or standing in their joint names shall be considered as community property. In furtherance of and as an example of the foregoing, Audrian and Lillian intend to have separate bank accounts, each of which shall be considered a separate property of the one of them in whose name any such account stands. In addition, they intend to have one or more joint bank accounts, and if and to the extent that they may do so, the funds therein shall be regarded as community property.

After their marriage, Audrian and Lillian lived together until Audrian's death on March 3, 1981. On April 10, 1981, Audrian's last will and testament was admitted to probate. Also on April 10, 1981, letters testamentary were issued to Ronald appointing him independent executor of Audrian's last will and testament. In addition to his appointment as independent executor, Ronald was designated the sole

beneficiary of Audrian's estate. Audrian made this designation pursuant to an agreement existing between Audrian and Lillian that they would leave nothing to each other.

On October 26, 1977, article 16, section 15 of the Texas Constitution provided:

> Sec. 15. All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise or descent, shall be the separate property of the wife; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband; provided that husband and wife, without prejudice to pre-existing creditors, may from time to time by written instrument as if the wife were a feme sole partition between themselves in severalty or into equal undivided interests all or any part of their existing community property, *or exchange between themselves the community interest of one spouse in any property for the community*

interest of the other spouse in other community property, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property of such spouse.

This Amendment is self-operative, but laws may be passed prescribing requirements as to the form and manner of execution of such instruments, and providing for their recordation, and for such other reasonable requirements not inconsistent herewith as the Legislature may from time to time consider proper with relation to the subject of this Amendment. Should the Legislature pass an Act dealing with the subject of this Amendment and prescribing requirements as to the form and manner of the execution of such instruments and providing for their recordation and other reasonable requirements not inconsistent herewith and anticipatory hereto, such Act shall not be invalid by reason of its anticipatory character and shall take effect just as though this Constitutional Amendment was in effect when the Act was passed. As amended Nov. 2, 1948.

TEX. CONST. art. XVI, § 15 (as amended 1948; amended 1980, 1987) (emphasis added). Article 16, section 15 was amended effective November 2, 1948, to add the "exchange" of community interest provision as a direct result of the Supreme Court's decision in *King v. Bruce*, 145 Tex. 647, 301 S.W.2d 803, *cert. denied*, 443 U.S. 769 (1947). *See* TEX. CONST. art. XVI, § 15 (as amended 1948). Under the provisions of the original version of article 16, section 15, no partition of the community estate was permitted. *See Arnold v. Leonard*, 114 Tex. 535, 273 S.W.2d 799 (1925). Thus, the *King* Court held that spouses could not escape the provisions of article 16, section 15 even by contracting (and actually completing a transfer) to partition the community estate outside of the State of Texas if Texas is the marital

domicile. *See King*, 145 Tex. at 657, 201 S.W.2d at 809. The Supreme Court, recognizing the hardships incumbent in article 16, section 15, gave the following invitation:

> If the electorate of the state desire a change of [article 16, section 15], it can be made through the legislative and constitutional channels provided by law.

King, 145 Tex. at 658, 201 S.W.2d at 809. In a reporter's note following *King* in the Texas Reports, it is noted that a proposed Constitutional Amendment was submitted to the electorate, "authorizing the husband and wife to enter into written agreement partitioning between themselves all or any part of their community property." 145 Tex. at 658. Such amendment was enacted on November 2, 1948. We interpret paragraph four under article 16, section 15 of the Texas Constitution as it

provided on October 26, 1977. The laws existing at the time a contract is made become a part of the contract and govern the transaction. *Wessely Energy Corp. v. Jennings*, 736 S.W.2d 624,626 (Tex. 1987). Laws which subsist at the time and place of the making of a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its tems. *Central Educ. Agency v. George West Indep. School Dist.*, 783 S.W.2d 200, 202 (Tex. 1989) (on motion for reh'g).

In the present case, Lillian contends that the "exchange" language emphasized above in section 15 validates paragraph four of the agreement. We agree. Therefore, at the outset, we deem it important to focus on the constitutional grant to spouses of the right to make a written instrument exchanging between themselves the community interest of one

spouse in any property for the community interest of the other spouse in other community property whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property of such spouse. Hence, we look to the written agreement to determine if Audrian and Lillian made such an exchange. In paragraph four of their agreement, Audrian and Lillian agreed that:

> [A]ll properties of every kind and nature, real and personal, held or standing in the name of only one of them, shall be considered as the separate property of the one of them in whose names such property is held or standing, and that only properties, whether real or personal, held or standing in their joint names shall be considered as community property. In furtherance of and as an example of the foregoing, Audrian and Lillian intend to have separate bank accounts, each of which shall be considered a separate property of the one of them in whose name any such account stands. In addition, they intend to have

> one or more joint bank accounts, and if and to the extent that they may do so, the funds therein shall be regarded as community property.

We conclude that by such language Audrian and Lillian made the spousal exchange of their community property within the meaning and as allowed by article 16, Section 15 of the Texas Constitution as it read on October 26, 1977. We reach this conclusion because we read paragraph four to provide that if earnings and income from Audrian's separate property is held or stands in his name, then that community property has been exchanged for other community property; to wit: the earnings and income from Lillian's separate property held or standing in Lillian's name. Likewise, if earnings and income from Lillian's separate property is held or stands in her name, then that community property has been exchanged for other

community property; to wit: the earnings and income from Audrian's separate property held or standing in Audrian's name. Indeed, this is the agreed arrangement contemplated by Audrian and Lillian when they wrote in paragraph four that "[i]n furtherance and as an example of the foregoing [they] intend to have separate bank accounts, each of which shall be considered as the separate property of the one of them in whose name any such account stands." Moreover, we know that this controversy involves earnings and income from Lillian's separate property deposited from time to time after the marriage in Lillian's separate bank accounts. We know this because Ronald alleged in his second amended original petition that "[d]uring the marriage of [Audrian] and [Lillian], and continuing to the date of death of

[Audrian], [Lillian] received income and earnings from various properties and businesses owned by her in a sum in excess of the minimum jurisdictional limits of this Court. [Lillian] deposited all such income and earnings into bank accounts, purchased stocks, bonds and made other investments in her sole name."

Nevertheless, in spite of the provisions of article 16, section 15 of the Texas Constitution in effect on October 26, 1977, Ronald insists that paragraph four is void under that article 16, section 15 of the Texas Constitution. Ronald argues that two decisions of the Supreme Court are controlling. Ronald cites *Burton v. Bell*, 380 S.W.2d 561 (Tex. 1964), and *Williams v. Williams*, 569 S.W.2d 867 (Tex. 1978). We disagree that *Burton* and *Williams* control. As to *Burton*, the written prenuptial agreement

is not set forth in the opinion in that case. Hence, we do not know if the agreement in *Burton* provided for the exchange of community property as does the agreement in the present case. Moreover, *Burton* does not address the constitutional issue. Nowhere in *Burton* is article 16, section 15 of the Texas Constitution mentioned. Instead, *Burton* held the prenuptial agreement invalid under a statutory provision. In the Supreme Court's words: "The prenuptial agreement was invalid under art. 4610 . . .in that it undertook 'to alter the legal order of descent [etc.].'" *Burton*, 380 S.W.2d at 563. For these reasons, we conclude that Ronald's reliance on *Burton* is misplaced and that *Burton* is not controlling.

Next, we consider the impact of *Williams* on the present case. In *Williams*, the applicable version of

article 16, section 15 before the Supreme Court was the same as in the present case. The question presented in *Williams* was "whether a premarital agreement to waive the constitutional and statutory rights of a surviving spouse to a homestead and other exempt property is valid." *Williams*, 569 S.W.2d at 868. The Supreme Court answered that the agreement to waive was valid. *Williams*, 569 S.W.2d at 870. However, the surviving spouse went on to contend that this valid portion of the agreement was vitiated by "void provisions." The asserted "void provisions" follow:

> 5. All income from the separate estate of each party, including dividends, interest, rents and salaries, and any increases, sales proceeds, reinvestment or changes in said separate estate, shall remain under control of the party receiving the same and shall be deposited in such party's separate account. It is the

> intent of the parties that such income, except for the personal living expenses hereinabove set forth, shall remain the separate property of each party.

Williams, 569 S.W.2d at 869. For the purposes of this opinion, we assume, but do not decide, that this language in the *Williams* agreement provided for the exchange of community property whereupon the community property exchanged becomes separate, as does paragraph four in the agreement in the present case. In *Williams,* the Supreme Court viewed the above portion of the agreement as void. The following is the Supreme court's entire disposition in the matter.

> The trial court correctly concluded that the agreement was void to the extent that income or other property acquired during marriage should be the separate property of the party who earned or whose property produced such income or acquisition. Such provisions were no more than a mere agreement between the parties to

> establish the character of the property prior to its acquisition during marriage in violation of both the Texas Constitution and the Family Code, TEX. CONST. art. XVI, § 15; TEX. FAM. CODE ANN. § 5.01 (1975); *see Gorman v. Gause*, 56 S.W. 2d 855 (Tex. Comm'n App. 1933, jdmt. adopted); *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925); *Hilley v. Hilley*, 161 Tex. 569, 342 S.W.2d 565 (1961).

Williams, 569 S.W. 2d at 870. Given this disposition of the matter, we hazard to conclude that in *Williams*, the Supreme Court did not have before it the contention that article 16, section 15 authorized an exchange of the community interest of one spouse for the community interest of the other spouse whereupon the portion or interest set aside to each spouse shall be separate property of such spouse.[1] We reach this conclusion because

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[1]The Court of Appeals' opinion in *Williams* makes no mention of article 16, section 15 or the issue before us in the present case. *See Williams*

the Supreme Court does not address the "exchange" language of article 16, section 15 as it would have done if the question had been raised. Hence, we are persuaded that the "exchange" question was not raised in *Williams* because the Court never mentioned that provision. In fact, the dissent quotes the first half of article 16, section 15, deleting the "exchange" provision from its partial quote. *See Williams*, 569 S.W.2d at 872 n.1 (Chadick, J., dissenting). Consequently, we are satisfied that had the impact of the "exchange" of community interest provision been at issue in *Williams* and been placed before the Supreme Court, the Supreme Court would have addressed the issue now before this court in the present case.

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v. Estate of Williams, 548 S.W.2d 492 (Tex. Civ. App.--Austin 1977), *rev'd sub nom. Williams v. Williams*,569 S.W.2d 867 (Tex. 1978).

For these reasons, we conclude that Ronald's reliance on *Williams* is misplaced and that *Williams* is not controlling.

In summary, we conclude that paragraph four of the prenuptial agreement is valid and not in violation of article 16, section 15 of the Texas Constitution in effect on October 26, 1977. Therefore, we conclude further that the trial court did not err in granting summary judgment in Lillian's favor. We overrule Ronald's fourth point of error.

Affirmed.

WARREN WHITHAM
JUSTICE

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Tex. R. App. P. 90

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APPENDIX D

Order issued July 27, 1990

In The
COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-89-00913-CV

RONALD DEE BECK, Appellant

V.

LILLIAN M. BECK, Appellee

ORDER

The Motion for Rehearing filed by appellant Ronald Dee Beck on June 29, 1990, is hereby OVERRULED.

WARREN WHITHAM
JUSTICE

APPENDIX E

IN THE SUPREME COURT OF TEXAS

NO. D-0272

RONALD DEE BECK, INDIVIDUALLY AND AS INDEPENDENT EXECUTOR OF THE ESTATE OF AUDRIAN L. BECK, DECEASED	§	
	§	FROM GRAYSON COUNTY
Petitioner	§	
	§	FIFTH DISTRICT
v.	§	
	§	
LILLIAN M. BECK,	§	
	§	
Respondent	§	

OPINION

This is a suit to determine the enforceability of a premarital agreement, entered into in 1977, under section 5.41 of the Texas Family Code[1] and article XVI, section 15, of the Texas Constitution.

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[1]Act of May 14, 1969, 61st Leg., R.S., ch.888, § 1, 1969 Tex. Gen Laws 2707, 2729, amended by Act of June 15, 1973, 63rd Leg., R.S., ch. 577, § 31, 1973 Tex. Gen. Laws 1596, 1608 (current version at Tex. Fam. Code Ann. §§ 5.42, .43, .56 (Vernon Supp. 1991)).

The trial court granted summary judgment to Lillian Beck, holding that the premarital agreement at issue was enforceable under the 1948 amendment to article XVI, section 15, of the Texas Constitution.[2] The court of appeals affirmed the trial court's judgment. 792 S.W.2d 813. We affirm the judgment of the court of appeals, but for different reasons.

Audrian and Lillian Beck entered into a premarital agreement on October 27, 1977, pursuant to section 5.41(a) of the Texas Family Code,[3] which purported to authorize premarital agreements.

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[2]Tex. Const. art. XVI, § 15 (1876, amended 1948).

[3]"Before marriage, persons intending to marry may enter into a marital property agreement as they may desire." Act of May 14, 1969, 61st Leg., R.S., ch. 888, 1969 Tex. Gen. Laws 2707, 2729, amended by Act of June 18, 1987, 70th Leg., R.S., ch. 678, 1987 Tex. Gen. Laws 2530, 2531-32 (current version at Tex. Fam. Code Ann. §§ 5.42, .43, .56 (Vernon Supp. 1991)).

Lillian's attorney drafted the agreement. Audrian's attorney reviewed the agreement, which Audrian and Lillian executed in his office. Paragraph four of the agreement provides:

> Notwithstanding that under the laws of the State of Texas the income from respective separate properties of Audrian and Lillian will be community property, they hereby agree that all the properties of every kind and nature, real and personal, held or standing in the name of only one of them shall be considered as a separate property of the one of them in whose name such property is held or stands, and that only properties, whether real or personal, held or standing in their joint names shall be considered as community property.

Audrian died on March 3, 1981. His will was admitted to probate on April 10, 1981. The probate court issued letters testamentary to Ronald Beck, Audrian's only child by a previous marriage, and

appointed him independent executor of Audrian's estate.

Ronald, in both his individual capacity and in his capacity as independent executor of Audrian's estate, brought suit in the district court against Lillian on March 2, 1984. In his first amended petition, he requested, among other things, a declaratory judgment that the premarital agreement was unenforceable under the 1948 amendment to article XVI, section 15, of the Texas Constitution. The underlying dispute between Ronald and Lillian is whether Audrian's estate owns a one-half interest in the income generated by Lillian's separate property. The disputed property includes income from rental properties and bank accounts, as well as "income and earnings from [Lillian's] separate estate."

In the trial court, Ronald and Lillian both filed motions for partial summary judgment on the issue of the enforceability of the premarital agreement under the Texas Constitution. The trial court granted Lillian's motion for summary judgment. The court of appeals affirmed, holding that the agreement was enforceable under the 1948 amendment to article XVI, section 15, as an "exchange" of each spouse's community interest in future income from separate property. 792 S.W.2d at 816.

The 1948 amendment to article XVI, section 15, of the Texas Constitution provided:

> All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of the wife; and laws shall be passed more clearly defining the rights of the wife, in relation as well

> to her separate property as that held in common with her husband; provided that husband and wife, without prejudice to pre-existing creditors, may from time to time by written instrument as if the wife were a feme sole partition between themselves in severalty or into equal undivided interests all or any part of their existing community property, or exchange between themselves the community interest of one spouse in any property for the community interest of the other spouse in other community property, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property of such spouse.

This court construed the 1948 amendment in Williams v. Williams, 569 S.W.2d 867 (Tex. 1978). We stated that any agreement attempting to recharacterize income or property acquired during marriage as separate property was "void" under article XVI, section 15, of the Texas Constitution. Id. at 870.

The court of appeals held that we construed only the "partition" language of the 1948 amendment in our decision in Williams and did not reach the issue of whether the agreement could be upheld as an "exchange" of each spouse's community interest. We disagree. In Williams, we simply stated that the premarital agreement violated the Texas Constitution and did not distinguish between a "partition" and an "exchange" of property. Id. Therefore, the court of appeals' holding, based on the distinction between a "partition" and an "exchange," was erroneous.

Having determined that the premarital agreement is unenforceable under the 1948 amendment, we must decide whether the retroactive application of the 1980 constitutional amendment to article XVI, section 15, of the Texas Constitution can

uphold the premarital agreement. The 1980 amendment specifically provided in pertinent part:

> [S]pouses may from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned by one of them, or which thereafter might be acquired, shall be the separate property of that spouse.

Tex. H.R.J. Res. 54, 66th., R.S., 1979 Tex. Gen. Laws 3227, 3227.

Ronald contends that the premarital agreement at issue is not enforceable under Williams. Lillian argues that we can apply the 1980 amendment because it was the law in effect when the trial judge rendered judgment. See Sadler v. Sadler, 769 S.W.2d 886,886 (Tex. 1989); Chiles v. Chiles, 779 S.W.2d 127, 129 (Tex. App. -- Houston [14th Dist.] 1989, writ denied); Daniel v. Daniel, 779 S.W.2d 110, 113 n.3 (Tex. App.--Houston [1st Dist.] 1989, no

writ). We agree with Lillian that the agreement is enforceable, but for different reasons.

This court has previously held that the legislature has the power to cure statutes that are invalid under the Texas Constitution by proposing a constitutional amendment that is adopted by the citizens of Texas. Hutchinson v. Patching, 103 Tex. 497, 129 S.W. 603 (1910). By passing a constitutional amendment that specifically refers to the invalid statute, the legislature can expressly validate not only the statute, but all actions taken in reliance on the validity of that statute. Id. at 501-02, 129 S.W. at 605; accord Ex parte Southern Ry. Co., 556 So. 2d 1082, 1090 (Ala. 1989); Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737, 741 (1967); Red Rover Copper Co. v. Industrial Comm'n, 118 P.2d 1102, 1105

(Ariz. 1941); People ex rel. McClelland v. Roberts, 148 N.Y. 360, 42 N.E. 1082, 1085 (1896).

The legislature may also impliedly validate an invalid statute by passing a constitutional amendment to cure it. This power is termed the doctrine of implied validation. It permits a constitutional amendment to impliedly validate a statute that was originally beyond the legislature's power to enact if it does not impair the obligation of a contract or impair vested rights. Annotation, Removal or Suspension of Constitutional Limitation As Affecting Statute Previously Enacted, 171 A.L.R. 1070, 1072-73 (1974). Several courts in other jurisdiction have adopted the implied validation doctrine. E.g., Paluck v. Board of County Comm'rs, 307 S.W. 2d 853, 855 (N.D. 1981); Matthews v. Quinton, 362 P.2d 932, 938-39 (Alaska

1961); Golden v. People ex rel. Baker, 101 Colo. 381, 74 P.2d 715,716 (1937). No court in this state has adopted the doctrine, although one commentator has proposed it as a potential basis for retroactively applying our 1980 constitutional amendment to uphold premarital agreements entered into under section 5.41 of the Texas Family Code. McKnight, The Constitutional Redefinition of Texas Matrimonial Property As It Affects Antenuptial and Interspousal Transactions, 13 St. Mary's L.J. 449, 474-75 (1982) [hereinafter McKnight].

In deciding whether the 1980 amendment to article XVI, section 15, of the Texas Constitution impliedly validated section 5.41 of the Texas Family Code and all agreements entered into pursuant to this statute, we must first ascertain whether the legislature intended to apply

the amendment retroactively. See McKnight at 475. To do so, we look to the language of the amendment, its legislative history, its purpose and the circumstances of its enactment. Cf. Tex. Gov't Code Ann. § 311.023 (Vernon 1988) (Statute Construction Aids).

The language of the statute itself is silent regarding any intended validation of section 5.41 or premarital agreements executed before 1980. However, the legislative history of the amendment, its purpose and the circumstances of its enactment persuade us that the legislature intended to cure section 5.41 and validate contracts entered into before the amendment became effective.

The legislative history of the 1980 amendment is enlightening. In a public

hearing on House Joint Resolution 54,[4] held on February 28, 1979, before the House committee on Constitutional Amendments, one witness testified:

> The idea here is just to make it a simple change <u>to allow people to do what they wanted to do all along</u>, and then find out under Texas law or what happens with the IRS later, that surprise, you can't do that.

[Emphasis added.] This testimony demonstrates that one purpose of the amendment was to uphold the intentions of spouses who entered into premarital agreements before 1980. Further, other testimony during the public hearing and the floor debate in the Texas House of Representatives on April 10, 1979, indicates that the legislators sought to supersede the effect of this court's decision in <u>Williams</u> and the federal tax

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[4]Tex. H.R.J. Res. 54, 66th Leg., R.S., 1979 Tex. Gen. Laws 3227, 3227

court's ruling in Estate of Castleberry v. Commissioner of the Internal Revenue Service.[5] Finally, the circumstances of the passage of the amendment less than two years after Williams and Castleberry indicate the legislature's intent to apply the constitutional amendment to agreements entered into before 1980. See Note, The 1980 Texas Marital Property Amendment: An Analysis of Its Meaning and Effect, 33 Baylor L. Rev. 307, 317 n.71 (1981).

The amicus curiae contends that retroactive application of the 1980 amendment in this case would impair a vested right. See Tex. Cons. art. I, § 16 ("No bill of attainder, ex post facto law, *retroactive law*, or any law impairing the obligation of contracts, shall be made.").

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[5]68 T.C. 682 (1977), rev'd, 610 F.2d 1282 (5th Cir. 1980). This case held that one-half of the income from a wife's separate property must be included in her husband's gross estate for federal estate tax purposes.

The amicus argues that Audrian had a vested right in one-half of Lillian's income because it was characterized as community property by operation of law. See Hopkins v. Bacon, 282 U.S. 122 (1930). We disagree. We believe that retroactive application of the 1980 amendment to article XVI, section 15, of the Texas Constitution would not impair any vested rights in this case.

The existence of any vested rights depends on whether the contract was void or voidable when Ronald and Lillian executed it in 1977. Audrian did not have a vested right in one-half of Lillian's income by operation of law, because Lillian had a *voidable* interest in the contract that the 1980 constitutional amendment impliedly validated. The voidable nature of this interest arises from an exception to the general rule that

contracts violating the law are void. 15 S. Williston, A Treatise On the Law of Contracts § 1762, at 201-02 (1972) (quoting Doherty v. Bartlett, 81 F.2d 920, 926 (1st Cir. 1936)) [hereinafter Williston, Law of Contracts]. This exception is set out in the Restatement (Second) of Contracts, which provides:

> In some instances, refusal to enforce a term may frustrate rather than further public policy. This is likely to be the case where legislation was enacted to protect a class of persons to which the promisee belongs in transactions of the kind involved. In such instances, there is no policy against the enforcement of the promise by one who belongs to that class.

Restatement (Second) of Contracts § 179 comment c (1981) (emphasis added)[6]; see

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[6]We adopted section 601 of the Restatement of Contracts in Hughes v. Hess, 141 Tex. 511, 172 S.W.2d 301 (1943). This section became comment c to section 179 of the Restatement (Second) of Contracts.

also 6A A. Corbin, Corbin On Contracts § 1540, at 833-34 (1962); 14 Williston, Law of Contracts § 1630A, at 25.

When the Texas Legislature originally proposed the adoption of the Spanish model of community property laws, it failed to include a constitutional provision incorporating the Spanish rule that future spouses could contract to recharacterize their property as they desired. Cameron, Hoffman & Ytterber, Marital and Premarital Agreements, 39 Baylor L. Rev. 1095, 1099-1100 (1987) [hereinafter Cameron]; Note, Antenuptial Agreements: Perspectives On the Texas Constitution and the Community Property System, 56 Texas L. Rev. 861, 862-63 (1978) [hereinafter Note]. Early court decisions interpreted our community property laws as establishing an inflexible system that forbade contracts attempting to recharacterize community

property. E.g., Gorman v. Cause, 56 S.W.2d 855 (Tex. Comm'n App. 1933, judgm't adopted). These decisions were the legal manifestations of the now outmoded belief that women were not capable of managing their affairs and needed the law's protection. Cameron at 1100; Note at 863.

Because Lillian is a member of the class intended to be protected by our earlier community property laws, the legislature and the citizens of Texas may, and did, validate premarital agreements such as this. The legislature and citizens could validate this premarital agreement because it was voidable when the parties entered into it. Because the contract was voidable, Audrian's community property rights in one-half of the income generated by Lillian's separate property never arose by operation of law.

We do not consider our statement in Williams that the agreement was "void" to be controlling here. The issue whether the premarital agreement was void or voidable was not before us in Williams. Nor was the question of implied validation, as the 1980 amendment had not yet been adopted. The only issue before this court was whether a premarital agreement waiving homestead rights and the exempt personal property set aside was constitutional. Williams, 569 S.W.2d at 868; see also McKnight at 450. This case, on the other hand, turns on the legal effect of the agreement when it was executed in 1977. Therefore, our prior classification of the agreement as "void," rather than "voidable," is not controlling under these facts. See Wiener v. Zwieb, 105 Tex. 262, 269, 141 S.W. 771, 774 (1911).

We hold that the 1980 amendment to article XVI, section 15 of the Texas Constitution demonstrates an intention on the part of the legislature and the people of Texas to not only authorize future premarital agreements, but to impliedly validate section 5.41 of the Texas Family Code and all premarital agreements entered into before 1980 pursuant to that statute. The legislature and the people of Texas have made the public policy determination that premarital agreements should be enforced. If we refuse to enforce Audrian's and Lillian's premarital agreement, we would thwart, rather than advance, our state's public policy enforcing these contracts. This, we decline to do.

Accordingly, we affirm the judgment of the court of appeals.

John Cornyn
Justice

Concurring opinion by Justice Cook.

OPINION DELIVERED: May 30, 1991

APPENDIX F

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

September 11, 1991

Mr. James M. Morris
Kennedy, Minshew, Campbell, Fry & Morris
P.O. Box 758
Sherman, TX 75091-0758

Mr. Robert W. Minshew
Kennedy, Minshew, Campbell, Fry & Morris
P.O. Box 758
Sherman, TX 75091-0758

Mr. Richard Harrison
Henderson Bryant & Wolfe
P.O. Box 340
Sherman, TX 75091

Ms. Staci Johnson
Henderson Bryant & Wolfe
P.O. Box 340
Sherman, TX 75091

RE: Case No. D-0272
Style: RONALD DEE BECK, INDIVIDUALLY AND AS INDEPENDENT EXECUTOR OF THE ESTATE OF AUDRIAN L. BECK, DECEASED V. LILLIAN M. BECK
No. 05-89-00913-CV
No. 89-1002 in the 336th District Court of Grayson County

Dear Counsel:

Today, the Supreme Court of Texas overruled the Motion for rehearing in the above referenced cause, as supplemented, with the enclosed opinion which includes minor corrections. The judgment remains the same.

Sincerely,

John T. Adams, Clerk

by_____

Blanca Morin, Deputy

cc: Ms. Cindi Mathis
Honorable Ray F. Grisham
Hon. Warren Whitham

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
FEB 7 1992
OFFICE OF THE CLERK

(3)

No. 91-1129

In The

Supreme Court of the United States

October Term, 1991

RONALD DEE BECK,

Petitioner,

—

vs.

LILLIAN M. BECK,

Respondent.

On Petition for Writ of Certiorari to the Texas Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

HENDERSON BRYANT & WOLFE
Attorneys for Respondent
123 N. Crockett
P.O. Box 340
Sherman, Texas 75090
(903) 893-9421

STACI SHARP JOHNSON
On the Brief

1622
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LIST OF PARTIES

Because the Petitioner failed to do so, Respondent certifies that the following is a complete list of all parties and persons interested in the outcome of this matter:

a) Ronald Dee Beck, Petitioner;

b) Robert Minshew, James Morris and the lawfirm of Kennedy, Minshew, Campbell and Morris, Petitioner's counsel;

c) Lillian M. Beck, Respondent;

d) Henderson Bryant & Wolfe, Respondent's counsel.

NO. 91-1129

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RONALD DEE BECK,

Petitioner

V.

LILLIAN M. BECK,

Respondent

BRIEF IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE MEMBERS OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

COMES NOW Lillian M. Beck, Respondent herein, and files this Brief in Opposition to Petition for Writ of Certiorari.

The term "Judgment", as used herein, refers to the opinion of the Texas Supreme Court reported at Beck v. Beck, 814 S.W.2d 745 (Tex. 1991).

RESPONSE TO STATEMENT OF JURISDICTION

The Respondent asserts that this Court does not have jurisdiction over this cause.

For jurisdiction to exist pursuant to 28 U.S.C.A. 1257, the Texas Judgment must involve a substantial federal question. There is no substantial federal question underlying this Judgment. It is based entirely upon state law. Specifically, the Summary Judgment granted and affirmed by Texas Courts, and the Judgment herein, involve the Texas community property system and the construction of the Texas Constitution and Texas statutes as related to enforcement of a Texas Marital Property Agreement, only. A review of the proceedings of the Texas Courts reveals no reference to and/or consideration of any federal constitutional or statutory provisions. Further, the federal cases occassionally cited in the Judgment address only the correct interpretation of Texas law.

The Petitioner did not raise any issues involving the federal constitution at any time in the state proceedings, prior to his Motion for Rehearing in the Texas Supreme Court. This is true notwithstanding that the Respondent asserted, in the Texas Trial Court through all appeals in Texas, that subsequent Amendments to the Texas Constitution should be applied to enforce the Marital Property Agreement under Texas laws. And, the Judgment, in fact, applies a subsequent Texas constitutional amendment to enforce the Agreement. Petitioner had the opportunity to oppose such application of law, as contrary to the United States Constitution, in the Texas Trial and Appellate Courts; however, he failed to do so and thereby waived such arguments.

Further, this appeal arose from a Summary Judgment. Under Texas procedural rules, Petitioner was required to raise all issues showing that Respondent was not

entitled to Summary Judgment, as a matter of law, in the Texas Trial Court if he intended to rely upon such issues on appeal. Rule 166A, Texas Rules of Civil Procedure; Central Education Agency v. Burke, 711 S.W.2d 7, 8 (Tex. 1986). The Texas Trial and Appellate Courts could consider only those issues expressly presented in the Motion for Summary Judgment and Response. City of Houston v. Clear Creek Basin Authority, 589 S.W.2d 671, 679 (Tex. 1979); Westland Oil Devel. Corp v. Gulf Oil Corp., 637 S.W.2d 903, 907 (Tex. 1982).

This procedural rule restricts the grounds upon which a Summary Judgment may be reviewed, even when the challenge asserted for the first time on appeal is of constitutional dimension. Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768 (Texas App.-Houston [1st Dist.] 1987, writ ref. n.r.e.), cert dismissed 485 U.S. 994 (1988).

For the first time, in his Motion for

Rehearing (following a Judgment adverse to him in the Texas court of last resort) Petitioner raised a claim under the 5th and 14th Amendments of the U.S. Constitution. He NEVER, prior to the filing of his Petition for Writ of Certiorari, referred to Article I, Section 10, Article III, Sections 1 and 2 and/or Article VI, Clause 2 of the U.S. Constitution in the Courts of the State of Texas.

The Statement of the Case contained in the Petition for Writ of Certiorari demonstrates that the Judgment of the Texas Supreme Court does not involve any substantial federal question. In his Statement of the Case, the Petitioner fails to identify the stage in the proceedings in the Texas Trial Court and Appellate Courts at which the federal questions, he urges before this Court, were raised. Nor does he identify the method and manner of raising them, the way in which they were passed on by

those Courts and pertinent places in the record which show that the federal questions were properly and timely raised so as to give this Court jurisdiction to review the case on Writ of Certiorari. This showing is required by Rule 14(1)(h) of the Supreme Court Rules. The Petitioner cannot comply with this requirement because he did not raise any federal issues properly and timely in the Texas Courts.

Rule 14(5) of the Supreme Court Rules requires Petitioner to present everything essential to a ready and accurate understanding of the points to be considered by this Court. The defects in Petitioner's Statement of the Case, alone, establish that this case does not warrant review for reason that there was no substantial federal question, properly and timely raised in the Texas Courts. The absence of the information required by Rule 14(1)(h) of the Supreme Court Rules, alone, is a sufficient reason to

deny the Petition.

Likewise, the Petitioner originally failed to attach an Appendix to his Petition. Such Appendix is required by Rule 14(1)(k) of the Supreme Court Rules. It must contain the Judgments of the Texas Supreme Court and lower Courts as well as the Order of the Texas Supreme Court denying rehearing. The Petitioner obviously did not want to attach these documents because they reveal that he raised no federal question, properly and timely, in the Texas Courts. These documents further reveal that the Judgment and denial of Rehearing turned only upon Texas law, and involved no determination of any federal constitutional issue(s).

Petitioner also failed to include a Listing of Parties in his Petition which is required by Rule 14(1)(b) of the Supreme Court Rules.

Petitioner's Petition for Writ of Certiorari contains multiple defects and

fails to demonstrate the jurisdiction of the Court to review this Judgment. This Petition should be denied for want of jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, Section 10 of the United States Constitution

Article 3, Section 1 of the United States Constitution

Article 3, Section 2 of the United States Constitution

Article 6, Clause 2 of the United States Constitution

5th Amendment of the United States Constitution

14th Amendment of the United States Constitution

Article I, Section 16 of the Texas Constitution

Article XVI, Section 15 of the Texas Constitution (1948)

Article XVI, Section 15 of the Texas Constitution (1980)

28 U.S.C.A. 1257

Section 5.41, Texas Family Code

Rule 14, The Supreme Court Rules

Rule 166A, The Texas Rules of Civil Procedure

STATEMENT OF THE CASE

This is a suit to determine the ownership of the income generated by the separate property of Respondent Lillian Beck during her brief marriage to Audrian Beck, deceased, the Petitioner's father. The substantive legal question before this Court is whether the Judgment of the Texas Supreme Court, in affirming the Texas Trial Court's Summary Judgment for Respondent, was proper. The equitable question, implicit in any substantive review of this matter, is whether the Petitioner is entitled to a financial windfall as a result of Lillian's marriage to Audrian notwithstanding that Audrian expressly intended, and took every step he could to insure, that Petitioner would not receive any such financial benefit.

To fully appreciate the questions of law

addressed in the Texas Supreme Court Judgment and the jurisdictional issues which are before this Court, a brief review of the facts and State Court proceedings is necessary:

On November 1, 1977, Audrian Beck married Lillian Massengale. At that time, they were elderly and retired. They each had been previously married; Lillian's first husband had died many years earlier, while Audrian had divorced his first wife a few years earlier. At the time of their marriage, both Audrian and Lillian had adult children from their first marriages. Those children were living on their own, were married and had their own children.

As a result of her first marriage, Lillian had a considerable separate estate, amassed prior to her marriage to Audrian, primarily as a result of the business activities of her first husband. Audrian, on the other hand was a retired postal employee

of limited financial means.

In anticipation of their upcoming marriage, Audrian and Lillian voluntarily and intentionally executed a Marital Property Agreement on October 26, 1977 pursuant to Section 5.41 of the Texas Family Code which allowed spouses and persons about to marry to enter Agreements "as they desired". At this time, the 1948 version of Article XVI, Section 15 of the Texas Constitution was in effect which set out the basic community property scheme in Texas. This Agreement was drafted by Lillian's attorney and reviewed by Audrian's attorney. The couple executed the Agreement before Audrian's attorney.

Paragraph 4 of the Agreement provided that income from the separate property of each spouse would remain the separate property of that spouse. The Agreement also provided that each spouse would make a will leaving nothing to each other and providing only for his or her natural descendants. The

purpose of the Agreement was to preserve the separate estates of each spouse for the benefit of the natural descendants of each. It became effective upon their marriage.

It is uncontroverted that this Agreement was voluntary and intentional without any fraud, overreaching, lack of disclosure, etc.

Audrian and Lillian lived together happily as husband and wife until Audrian's death on March 3, 1981.

Pursuant to the Agreement, Audrian willed all of his property to his only son, the Petitioner. The Petitioner then filed suit against Lillian, seeking (among other things) to have Paragraph 4 of the Agreement declared void and unenforceable under Texas Constitution. He then intended to circumvent Audrian's wishes and take one half of all the income generated by Lillian's separate property during the marriage.

Regarding Petitioner's claim to the income from Lillian's separate property, the

Texas Trial Court granted two separate Summary Judgments in favor of Respondent. In one, the Trial Court held that the Petitioner's claim was barred by limitations. (The Judgment based upon limitations is further discussed in Appellee's Brief in the Court of Appeals at Dallas, Texas.) In the second, the Trial Court held that Paragraph 4 of the Agreement was valid and enforceable under the Texas Constitution.

The second Summary Judgment, involving the enforceability of the Agreement under the Texas Constitution, was affirmed by the Texas Court of Appeals at Dallas and the Texas Supreme Court. It is the one at issue here.

The Texas Supreme Court Judgment holds that, although the Agreement was executed in 1977, the 1980 Amendment to Article XVI, Section 15 of the Texas Constitution governs and expressly makes the Agreement enforceable. The 1980 Amendment expressly allowed spouses to enter into Agreements

making income from separate property separate. The 1948 version of the Texas Constitution did not expressly allow spouses to make such Agreements. The Court held that the 1980 Amendment impliedly validated such Agreements which were entered into pursuant to Section 5.41 of the Texas Family Code.

As a result of the Judgment of the Texas Supreme Court, the Petitioner is now barred, under Texas law, from recovering one half of the income generated by Lillian's separate property. He comes before this Court complaining that the Texas Supreme Court's Judgment denies him this money in violation of rights provided by Article 1, Section 10; Article 3, Section 1; Article 3, Section 2; Article 6, Clause 2; and the 5th and 14th Amendments of the United States Constitution. He never, however, timely and properly raised these provisions in the Texas Courts. (Also see Respondent's Response to Statement of Jurisdiction.)

Regarding proper and timely presentation of federal constitutional provisions in Texas Courts, Respondent argued (among other things) that subsequent Amendments to the Texas Constitution should be applied to enforce the Marital Property Agreement in the Texas Trial Court. She also presented this argument (among others) in the Texas Court of Appeals and the Texas Supreme Court. The Texas Supreme Court Judgment applies a subsequent amendment to uphold the enforceability of the Marital Property Agreement; however, for reasons different than those advanced by Respondent.

Throughout the State Court proceedings Petitioner had the opportunity to challenge use of subsequent Amendments to the Texas Constitution to enforce the Marital Property Agreement as violative of the rights guaranteed by the United States Constitution to avoid the Summary Judgment and its affirmation. Nowhere in the Texas

proceedings did Petitioner raise the claims he now asserts under Article I, Section 10, Article III, Sections 1 and 2 and/or Article VI, Clause 2 of the U.S. Constitution. Further, Petitioner only raised a claim under the 5th and 14th Amendments of the United States Constitution in his Motion for Rehearing, following rendition of an adverse Judgment. It is patent that Petitioner did so as an after thought, in a last effort to avoid an undesirable result.

It is further patent from review of the record (Plaintiff's Petition, Defendant's Answer, Motion for Summary Judgment, Petitioner's Response to Motion for Summary Judgment, Summary Judgment, briefing in the Court of Appeals at Dallas, Opinion of the Court of Appeals at Dallas, briefing in the Texas Supreme Court, Opinion of the Texas Supreme Court, and denial of Rehearing) that the case presented by the parties in Texas Courts, and the Judgment of the Texas Supreme

Court, involve only state law.

SUMMARY OF ARGUMENT

At the outset, Respondent asserts that the Judgment to be reviewed is based entirely upon state law and involves no substantial federal questions properly and timely presented in the Texas Courts. Further, Petitioner failed to comply with numerous requirements of Rule 14 of the Supreme Court Rules. For these reasons, this Court does not have jurisdiction to review this Judgment.

Additionally, the Petitioner's claims under the United States Constitution lack merit and are unworthy of review by this Court, in that such claims are entirely frivolous, are unsupported by any authority and/or have already been decided contrary to the positions advanced by Petitioner.

ARGUMENTS

RESPONSE TO FIRST QUESTION PRESENTED

The Petitioner's claims that his federal due process rights were violated by the Texas Supreme Court's Judgment, in overruling prior case law and/or finding the Agreement voidable, are without merit.

First, his assertion that this Judgment overrules prior case law is false and demonstrates his total lack of understanding as to the meaning of the Judgment. Specifically, the Judgment does not validate all Marital Property Agreements.

The Texas Supreme Court held that the 1980 Amendment validates Agreements entered into pursuant to 5.41 of the Texas Family Code which was enacted in the early 1970s. Agreements entered into under the 1948 version of the Texas Constitution, prior to the enactment of 5.41, are not validated by the 1980 Amendment pursuant to this Judgment. Nor are Agreements entered into under the 1948 version of the Texas Constitution, after the enactment of 5.41, which were litigated

prior to the enactment of the 1980 Amendment validated. For Agreements such as those, the dicta of Williams v. Williams, 569 S.W.2d 867 (Tex. 1978), and its progeny, still stands; therefore, the Texas Supreme Court's statement, that its Judgment does not overrule those earlier decisions, is accurate. Beck v. Beck, 814 S.W.2d 745 (Tex. 1991). Thus the Petitioner's claim that this decision overrules prior case law fails, from the outset, for reason that prior case law is not overruled by the decision.

The adoption of the implied validation doctrine in no way overruled any prior Texas law because there was no Texas law prohibiting the adoption of this doctrine. The previous existence and statutory embodiment of the express validation doctrine as a means of construction did not limit the Courts' authority to adopt the implied validation doctrine as another means of construction. Both doctrines are necessary

to assure that legislative intent is carried out in all cases.

Moreover, due process rights are not violated when a court changes a ruling on the constitutionality of law. State Board of Ins. v. Todd Shipyards Corp., 370 U.S. 451 (1962). For this reason, even if any decisions were overruled by the Judgment, which Respondent denies, Petitioner's claim that due process rights are violated by the Judgment overruling other Texas laws (prohibiting implied validation and/or making Agreements void) is defeated.

Further, due process rights are not infringed upon by a wrong decision on the merits as long a full hearing was afforded. U.S. v. Gallagher, 183 F.2d 342 (3rd Cir. 1950), cert denied, 340 U.S. 913 (1950). Nor is due process denied by the retroactive application of a new legal principal expounded in a judicial proceeding. Sewell Coal Co. v. Federal Mine Safety & Health

Review Com'n, 686 F.2d 1066 (4th Cir. 1982).

The Petitioner's claim that the Agreement was void, and not voidable, is supported solely by dicta in the Williams decision. 569 S.W.2d 867 (Tex. 1978). The issue in Williams was not whether a similar Agreement was void; instead, the issue before the Court involved waiver of homestead rights. The dicta of Williams does not control the Judgment in this subsequent suit in which the very point is raised and decided. Osaka Shosen Kaisha Line v. U.S., 300 U.S. 98 (1937); Wiener v. Zwieb, 141 S.W.2d 771, 774 (Tex. 1911). This is especially true here, where the 1980 Amendment changed the law and the change is what made the Agreement voidable.

Next, the Judgment of the Texas Supreme Court indicates that it construed the 1980 Amendment as applying to persons about to marry and spouses. Beck v. Beck, 814 S.W.2d 745, 747 (Tex. 1991). It is clear from the

Judgment that the Court found that Audrian and Lillian satisfied all the technical requirements of the Amendment. Further, Audrian and Lillian were spouses at the time their Agreement became effective; therefore, it is an Agreement made between spouses. As such, it is among those Agreements authorized by the 1980 Amendment, even according to the limited and hypertechnical construction Petitioner urges. The Amendment does not prohibit parties from executing a document which will become effective at some later date when those parties are spouses.

Finally, it is important to recognize that, obscured within the minutia of his due process arguments, the Petitioner is basically claiming that he has been deprived of property in violation of his federal due process rights.

To find such a violation there must be 2 showings: 1) that the Petitioner had a protected right in the subject property of

which he is being deprived and 2) that the Petitioner was not given adequate notice and hearing prior to such deprivation.

As is discussed in great detail in the Response to Second Question Presented, the Petitioner (whose claims to the subject property are solely derivative to those of Audrian Beck) has no vested property right in the income as community property. Moreover, even if Audrian held any interest in the property, he waived such interest in executing the Agreement. (For further discussion of waiver see Respondent's Response to Application for Writ of Error and Appellee's Brief.) Further, as demonstrated by the Statement of the Case and the Record, Petitioner has been provided ample notice and full hearing at every stage of this proceeding. (And he lost at every such stage.) Price v. City of Junction, Texas, 711 F.2d 582 (5th Cir. 1983); Reimer v. Smith, 663 F.2d 1316 (5th Cir. 1981).

Specifically Petitioner received notice and hearing in 3 levels of Texas Courts, before a total of 13 judges, during a period of more than 4 years, with briefing and supplemental briefing ad nauseam in every court and on every point, and oral argument in each court; therefore, this case is readily distinguishable from that cited by the Petitioner as analogous. See Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) wherein Hill received no hearing at all.

The history of the state court litigation in Hill is so completely dissimilar to that afforded the Petitioner here that Petitioner's reliance thereon is almost comical and most certainly indicative of the frivolous nature of his Petition.

RESPONSE TO SECOND QUESTION PRESENTED

Of equal magnitude to his blunder, in comparing this case with Hill, is

Petitioner's blatant misrepresentation to this Court that he has vested rights in community property and/or to disaffirm contracts, pursuant to Art. I, Section 10 of the United States Constitution, which the Judgment violates.

It is crucial to note that Art. I, Section 10 of the United States Constitution prohibits retroactive application of law only when doing so impairs contractual obligations or constitutes an ex post facto law. It contains no prohibition expressly concerning the impairment of vested rights. (The Texas Constitution, on the other hand, is broader, expressly prohibiting bills of attainder, ex post facto laws, retroactive laws which impair vested rights or laws impairing the obligations of contracts. Tex. Const. Art. I, Section 16. The Amicus raised only the Texas constitutional provision in the Texas Supreme Court proceeding. See Beck v. Beck, 814 S.W.2d 745, 748 (Tex. 1991).)

Any federal claim relating only to impairment of vested rights must be analyzed under the due process clauses of the 5th and/or 14th Amendments. (See Response to First Question Presented for discussion of alleged due process violations.)

The Judgment clearly does not involve an ex post facto law; therefore, the Petitioner's challenge to the Judgment under Art. I, Section 10 of the U.S. Constitution must relate to impairment of the obligations of contracts.

Notwithstanding that Art. I, Sec. 10, of the U.S. Constitution for our purposes, addresses only retroactive laws which impair contractual obligations, and not those which impair vested rights, the Petitioner's second argument fails at the outset because the Petitioner has no vested rights in the subject property.

The determination of whether a right is vested is a matter for state court decision.

Laidlaw Bros. v. Marrs, 273 S.W. 789 (Tex. 1925); Schaper v. City of Huntsville, 813 F.2d 709, rehearing denied, 818 F.2d 865 (5th Cir. 1987); Glagola v. North Texas Mun. Water Dist., 705 F.Supp. 1220 (E.D.Tex. 1989); In re Texas Extrusion Corp, 68 B.R. 712, affirmed, 836 F.2d 217, affirmed, 844 F.2d 1142, cert. denied, Texas Extrusion Corp v. Lockheed Corp., 488 U.S. 926 (1988).

Contrary to the Petitioner's claims, this Court has long recognized that spouses do not have vested rights in community property. Arnett v. Reade, 220 U.S. 311 (1910); Also see Estate of Wyly v. Commissioner and Castleberry v. Commissioner and Frankel v. United States, 610 F.2d 1282 (5th Cir. 1980). More specifically, this Court has held that a husband has no vested right in the income from his wife's separate property, such that it cannot be taken away by law. Neilson v. Kilgore (Baker v. Kilgore), 145 U.S. 487 (1892). Further, the

Texas Supreme Court reiterated in the Judgment that, under Texas community property law, a spouse has no vested rights in income generated by the other spouses's separate property as community in nature. Beck v. Beck, 814 S.W.2d 745, 748 (Tex. 1991).

There are no vested rights in property as community because, in Texas, marriages are not contracts vesting rights in the parties so as to preclude the retroactive application of amendments to the laws which govern that relationship. Maynard v. Hill, 125 U.S. 190 (1888); Saltarelli v. Saltarelli, 670 S.W.2d 785 (Tex. App.-Fort Worth 1984, no writ); Hopkins v. Hopkins, 540 S.W.2d 783 (Tex. Civ. App.-Corpus Christi-1976, no writ); McGinley v. McGinley, 295 S.W.2d 913 (Tex. Civ. App.-Galveston 1956).

That no vested rights exist is further demonstrated by the long standing Texas practice of retrospectively applying law in matters relating to family and marital

property. Sadler v. Sadler, 769 S.W.2d 886 (Tex. 1989); Williams v. Williams, 5569 S.W.2d 867 (Tex. 1978) applying 1975 law to a 1973 Agreement; Chiles v. Chiles, 779 S.W.2d 127 (Tex. App.-Houston [14th Dist.] 1989, writ denied); Daniels v. Daniels, 779 S.W.2d 110 (Tex. App.-Houston [1st Dist.] 1989); Grossman v. Grossman, 779 S.W.2d 551 (Tex. App.-Corpus Christi 1990); Hopkins v. Hopkins, 540 S.W.2d 783 (Tex. Civ. App.-Corpus Christi 1976, no writ) regarding rights and defenses to divorce and personal property; O'Connor v. O'Connor, 694 S.W.2d 152 (Tex. App.-San Antonio 1985, writ ref. n.r.e) regarding wife's rights to military retirement benefits; McGinley v. McGinley, 295 S.W.2d 913 (Tex. Civ. App.-Galveston 1956) regarding the period of separation required for divorce; Trickey v. Trickey, 642 S.W.2d 47 (Tex. Civ. App.-Fort Worth 1982, no writ) regarding no fault divorce; May v. Curry, 385 S.W.2d 603 (Tex. Civ. App.-

Tyler 1964) regarding inheritance rights of adopted children; Coulter v. Melady, 489 S.W.2d 156 (Tex. Civ. App.-Texarkana 1972, writ ref. n.r.e.), cert denied, 414 U.S. 823 (1973) regarding heirs expectancy and not vested right in estate subject to changes in law.

A spouse may have had a community INTEREST in income from the separate property of the other spouse under the 1948 version of Art. XVI, Sec. 15 of the Texas Constitution. Hopkins v. Bacon, 282 U.S. 122 (1930). This community interest, however, is not the equivalent of a vested right which may not be divested by retroactive application of law. No Court has ever held that the non-owning spouse has a vested RIGHT in income from separate property as community property. See discussion in Estate of Wyly v. Commissioner, et. al., 610 F.2d 1282 (5th Cir. 1980) distinguishing a right from an interest. This community interest does not come "near

the level of a right." Estate of Wyly, at 1291. It is so "limited, contingent and expectant that it does not amount to a 'right to the income'". Estate of Wyly, at 1294.

The Petitioner misleads this Court when, on page 27 of his Petition, he states "This Court held that persons have vested rights in community property" citing Hopkins v. Bacon, 282 U.S. 122 (1930). The Hopkins decision discusses only "interests" not "rights".

As a matter of law, Audrian, as Lillian's spouse, had no vested rights in income from her separate property as community property. If Audrian had no vested rights in this income, Ronnie does not either. Without a vested right in the income, the Petitioner's argument, that retrospective application of law will impair vested rights, fails.

Petitioner's next theory confuses impairment of vested rights with impairment

of obligations of contract. He argues he has a vested right to disaffirm the Agreement which has been impaired under the federal contract clause by the retrospective operation of the 1980 Amendment.

Notwithstanding common sense, the Petitioner argues that the Judgment, which enforces the Agreement according to its own terms, results in the impairment of its contractual obligations. How can enforcing a contract possibly impair the obligations assumed thereunder? To the contrary, enforcing a contract does not impair its obligations; instead, enforcement of a contract confirms and promotes the obligations undertaken pursuant to that contract!

There is no authority supporting the existence of any right, vested in Petitioner, to disaffirm the Agreement. The only "right" possibly taken away by the Judgment is that of dishonestly repudiating the Agreement,

entered into by Audrian in good faith, knowingly and intentionally to prevent the Petitioner from doing exactly what he is trying to do in this suit, i.e., receiving the subject income. Randall v. Krieger, 90 U.S. 137, 149 (1875); also see Hengel v. Hengel, 365 N.W.2d 16 (Wi 1985).

By urging this ground, the Petitioner only magnifies his unsavory position as the greedy step-relation seeking unearned and undeserved financial gain.

In short, the Petitioner has no vested rights (on his own and/or derivative to Audrian) in the income as community property or to disaffirm the Agreement protected by the Contract Clause of the United States Constitution and violated by the Judgment; therefore, his second line of argument fails.

RESPONSE TO THIRD QUESTION OF PETITIONER

The Petitioner again misleads this Court when he argues that the decisions of this

Court require that constitutional amendments must be applied prospectively only. To the contrary, the United States Constitution neither prohibits nor requires that changes in the law be applied retroactively. Linkletter v. Walker, 381 U.S. 618 (1965); Rohm and Hass Co. v. Dawson Chemical Co., Inc., 557 F.Supp. 739 (D.C.Tex. 1983), cert denied, 444 U.S. 986 (1979) and cert granted,. 444 U.S. 1012 (1980), affirmed 448 U.S 176 (1980). The enactment of a state law which does not impair the obligation of contracts or constitute an ex post facto law is permissible under the Federal Constitution. Satterlee v. Matthewson, 27 U.S. 380 (1829); Baltimore & S.R. Co. v. Nesbit, 51 U.S. 395 (1850); Drehman v. Stifle, 76 U.S. 595 (1869).

Moreover, one of the very cases Petitioner relies upon, as supporting the proposition that laws are to be prospective only, allowed retroactive application of law.

See U.S. v. Donnelly, 397 U.S. 286 (1970). Likewise it has long been the rule in Texas that a Texas constitutional amendment may operate retrospectively when the words employed or the objective to be accomplished or the nature and character of the provision clearly manifests the intent to do so and as long as no vested rights or obligations of contracts are impaired or destroyed. Bender v. Crawford, 33 Tex. 745 (1870); Grisby v. Peak, 57 Tex. 142 (1882); Texas Constitution Article 1, Section 16.

As set forth in the Judgment, the Texas Supreme Court found abundant evidence that the Texas legislature intended to apply the 1980 amendment retroactively. Specifically, the Texas Supreme Court reviewed the language of the 1980 Amendment, its legislative history, its purpose, the circumstance of its enactment, testimony taken at public hearings before the Texas House committee on Constitutional Amendments and the floor

debate in the Texas House of Representatives and the fact of its passage less than 2 years after the rendering of several judicial opinions which were highly unpopular among the People of Texas. The Court specifically noted that one purpose of the 1980 Amendment was to "uphold the intentions of spouses who entered into premarital agreements before 1980." Beck at 748. Petitioner's assertions of insufficient evidence of legislative intent simply ignore the text of the Judgment.

As discussed in the Response to the Second Question Presented and above, no vested rights or obligations of contract were impaired by retroactive application of the 1980 Amendment; therefore, the Texas Constitution does not prohibit such application. Nor does the federal Constitution.

The cases Petitioner cites as standing for the proposition that "in matters of

interpretation, constitutional amendments are to be applied prospectively" simply do not stand for that proposition. Further, it is unclear what Petitioner is referring to with the statement "in matters of interpretation", i.e., interpretation of an amendment or interpretation of some fact like a contract in light of an amendment.

Next, Petitioner's assertion that the decisions of this Court allow retroactivity only when legislative intent to do so is express is interesting in 2 respects: first, it contradicts his prior allegation that constitutional amendments must be applied prospectively only; and, it is completely unsupported by any reference to authority.

Courts of at least 3 other states, in addition to Texas, have considered this issue and found no prohibition in relying upon implied intent in the appropriate case. See Golden v. People ex. rel. Baker, 74 P.2d 715, 716 (Colo. 1937); Paluck v. Board of County

Commissioners, 307 N.W.2d 853, 855 (N.D. 1981); and Matthews v. Quinton, 362 P.2d 932, 938-9 (Alaska 1961), cert denied, 368 U.S. 517 (1962). As evidenced by these decisions the implied validation doctrine has been in use for more than 50 years in states across the nation.

Further, the Alaska court decision applying the implied validation doctrine was presented to this Court for review and this Court summarily denied the Writ of Certiorari, thereby allowing the implied validation doctrine to stand under state law. Matthews v. Quinton, 362 P.2d 932, 938-9 (Alaska 1961), cert denied, 368 U.S. 517 (1962).

It is, therefore, uncontroverted that the decisions of this Court do not require only prospective application of constitutional amendment and/or express intent for retrospective operation of law.

RESPONSE TO FOURTH QUESTION OF PETITIONER

It is clear from the Judgment that the Texas Supreme Court went to extraordinary lengths to arrive at the correct interpretation of Texas law. It did so in light of changes in the law, and public policy underlying it, occurring in Texas since 1948. The analysis of that Court is set forth, step by step, in the Judgment and includes consideration of numerous factors which establish legislative intent to apply the 1980 Amendment retroactively.

Respondent submits that the Texas Supreme .Court Judgment is a correct interpretation of Texas Law and not an unfounded creation of law to reach a desired result as suggested by Petitioner.

For purposes of argument, however, even if the Texas Supreme Court did create, as opposed to interpret, Texas law in reaching its decision, such action would not warrant review of the Judgment by this Court. It

cannot be reasonably argued that the Separation of Powers Doctrine, or any other provision, of the United States Constitution provides a basis for this Court to review the Texas Supreme Court's Judgment on a claim that the Texas Court exceeded its judicial powers and engaged in a state legislative function.

As the Petitioner admits, this Court has held that the concept of Separation of Powers, of the United States Constitution, does not apply to state government. Sweezy v. New Hampshire, 354 U.S. 234 (1957); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981). The state determines the powers allocated to each branch of state government. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981). For this reason, the authority of a state court to create as opposed to interpret law is beyond the scope of the United States Constitution and is a question of state law only; it does

not present a question appropriate for review by this Court.

Interestingly, in inviting this Court to revisit the above cited decisions, the Petitioner asks this Court to engage in the same type of judicial activism he charges against the Texas Supreme Court. Specifically, this Court has already interpreted the Separation of Powers Doctrine of the United States Constitution, holding it is not binding upon state government. Any change in this holding would have to be supported by some change in the federal Constitution itself; otherwise, this Court would be creating law itself because one provision of the Constitution cannot have 2 inconsistent and diametrically opposing meanings. There has been no change in the language of the Constitution which supports this outcome; therefore, argument for the expansion of the federal Separation of Powers doctrine is unfounded.

By requesting this Court to reinterpret a provision of the United States Constitution, and reach an entirely different result, the Petitioner demonstrates that he has no qualms about judicial activism, as long as it works to his favor.

Finally, the charge that a state court has created, as opposed to correctly interpreted, state law is available to any losing state court litigant who disagrees with a state court judgment involving a point of law not previously ruled upon or a newly enacted law or a decision reflective of public policy which has changed over time. If this Court is required to review all such cases, its docket will be overwhelmed with Petitions to review state court interpretations of state law. This is not the proper purpose of this Court as related to its review of state court judgments.

Regarding the Supremacy clause of the federal Constitution, the Petitioner has

failed to demonstrate that the Judgment here violates the United States Constitution in any way. With no conflict between state and federal law, the Petitioner's reliance upon Art. VI, Clause 2 is misplaced.

CONCLUSION

For the foregoing reasons, Respondent prays that the Petition for Writ of Certiorari be denied; or, alternatively, that this case be remanded to Texas Courts for determination of the Statute of Limitation issues.

Respectfully Submitted,

HENDERSON BRYANT & WOLFE
123 N. Crockett
P.O. Box 340
Sherman, Texas 75091
Phone (903) 893-9421
Fax (903) 892-2397

Staci Sharp Johnson
State Bar No. 10793200